No. 97-1536

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF ARIZONA EX REL. ARIZONA DEPARTMENT OF REVENUE,
Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Arizona Court of Appeals, Division One

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the validity of a state tax on the gross receipts of a federal contractor is governed by intergovernmental tax immunity or Federal Indian law preemption principles.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in

legal issues that affect state and local governments.[1] Of obvious concern to *amici* and their members is the preservation of state taxing authority, including the collection of taxes from federal contractors who engage in commercial activities on Indian reservations.

The issue in this case, whether Arizona can impose a non-discriminatory transaction privilege tax on a federal contractor engaged in construction activity on a reservation, is of particular importance to *amici*. For more than sixty years, it has been the rule that a state gross receipts tax on a federal contractor does not violate intergovernmental tax immunity. *See James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937). The Arizona Court of Appeals disregarded this clear rule and instead applied the multi-factor balancing approach of Indian law preemption analysis to invalidate the tax. It did so notwithstanding that no Tribe was a party to the contract.

The lower court's approach marks an unwarranted expansion of Indian law preemption analysis and interjects great uncertainty into an area where clear rules are necessary for effective fiscal planning. It calls into question the State's authority to enforce both tax laws and other non-discriminatory measures.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to state and local governments, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT

This case arises out of Arizona's attempt to enforce its transaction privilege tax on Blaze Construction Co., which contracted with the United States to build roads on various Indian reservations located in the State. The transaction privilege tax is a form of gross receipts tax, *see* Ariz. Rev. Stat. § 42-1306, which the State imposes on a wide variety of businesses, including prime contractors. *See id.* § 42-1317. The tax does not discriminate against federal contractors.

Under the Federal Lands Highway Program, 23 U.S.C. § 204, the United States Bureau of Indian Affairs (BIA) receives Federal Highway Administration (FHWA) funds for road improvement projects on Indian reservations. Each year, the FHWA advises the BIA's Branch of Roads as to the approximate amount of funds it will receive under the program. Pet. App. 3a. Tribes submit project requests to the Branch of Roads, which decides the scope of the project and the amount to be spent. *Id.* at 3a. The Branch of Roads issues a specification package for each project and BIA's Design Section solicits bids. *Id.* at 4a. After the FHWA authorizes funding for a particular project, BIA awards the contract. *Id.*

BIA awarded Blaze contracts to construct roads and bridges on six Indian reservations located in Arizona. *Id.* at 2a-4a. While Blaze is incorporated under the laws of the Blackfeet Tribe of Oregon, *see id.* at 2a, it is not owned by a member of any of the Arizona Tribes upon whose reservations it performed

the contracts. Blaze was paid entirely by the Federal Government.

Each year the Federal Government, through several agencies, enters into substantial contracts to carry out its programs for Indian tribes. The exact amount of these contracts is not easily ascertainable for various reasons.[2] The amount of budgetary authority for these programs does, however, provide some indication of the size of the Federal Government's contracting on behalf of Tribes. For example, in Fiscal Year 1997, the Indian Reservation Roads program had an authorized funding level of $191 million. *See Indian Reservation Roads Program*, at 3. In Fiscal Year 1997, BIA incurred obligations of $49 million for education construction, $3 million for public safety and justice construction, $51 million for resource management construction, and $16 million for improvements and repairs to various Bureau facilities and systems. *See* Appendix, *Budget Of The United States Government: Fiscal Year 1999* 547 (U.S. G.P.O. 1998).[3]

The Indian Health Service, an agency of the Department of Health and Human Services, received $373,375,000 in Fiscal Year 1998 budgetary author-

[2] Overhead and administrative costs are frequently not readily ascertainable. Moreover, some programs such as the roads program are funded under appropriations made to both the Departments of the Interior and Transportation. *See* Federal Highway Administration & Bureau of Indian Affairs, *Indian Reservation Roads Program Stewardship Plan* 4 (July 1996).

[3] These amounts include administrative costs and are thus greater than actual contract amounts. The data is, however, helpful in demonstrating the magnitude of the Federal Government's contracting on behalf of Tribes and the potential revenue loss to the States.

ity for its Contract Health Services, which purchases "hospital care, physician services, outpatient care, laboratory, dental, radiology, pharmacy, and patient transportation." Indian Health Service, Department Of Health and Human Services, Fiscal Year 1999 Justification of Estimates for Appropriations Committees, 64. The Indian Health Service also contracts with "managed care and health maintenance activities . . . plac[ing] a high priority on developing contracts and rate agreements with private sector providers." *Id.* at 65. In addition, the Indian Health Service received $262 million in Fiscal Year 1997 budgetary authority to "support[] construction, repair and improvement, equipment, and environmental health and facilities." Appendix, *Budget Of The United States: FY 1999*, at 404-05. As the data indicate, the Federal Government makes substantial expenditures for goods and services that are furnished by federal contractors on reservations and large amounts of state tax revenue are therefore at stake in this case.

SUMMARY OF ARGUMENT

1. This Court has long held that a non-discriminatory state tax on the gross receipts of a federal contractor does not violate intergovernmental tax immunity even though the Federal Government shoulders the economic burden of the levy. *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937). The Court has further limited the scope of the immunity to prohibit a state tax only when it falls on the United States, its agencies or instrumentalities. Thus, unless the entity subject to tax is an integral part of, or an arm of, the Federal Government, it is not entitled to

intergovernmental immunity in the absence of Congressional legislation granting it immunity.

Applying these clear principles demonstrates that Blaze is not entitled to immunity from Arizona's tax. Blaze is not an arm or instrumentality of the United States. Rather, it is a corporation organized under the laws of the Blackfeet Tribe of Oregon whose purpose is to engage in commercial activity for profit. Moreover, Congress has not enacted legislation immunizing Blaze and other federal construction contractors from state taxation. Blaze is therefore subject to Arizona's transaction privilege tax.

2. The Arizona Court of Appeals failed to give controlling weight to this Court's intergovernmental tax immunity cases. Instead, it took the unprecedented step of applying the multi-factor balancing approach of Indian preemption analysis notwithstanding that the taxable transaction did not involve a Tribe or its members.

The Court has employed a categorical approach in evaluating state taxation of Tribes and their members on the reservation, imposing a *per se* rule prohibiting such taxes absent Congressional authorization or "cession of jurisdiction." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). In these circumstances, the Court has explained that balancing is not necessary because "the federal tradition of Indian immunity from state taxation" of Tribes and their members on the reservation "is very strong and . . . the state interest in taxation is correspondingly weak." *Id.*

This reasoning applies with equal force when a State asserts taxing authority over a transaction on

a reservation that does not involve a Tribe or its members. As the Court has explained, its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992). A long line of cases further establishes that in such circumstances, the State's authority to tax is very strong and the federal and tribal interests are correspondingly weak. In these instances, there is no need for the judiciary to rebalance the various interests and usurp Congress' authority in the area. The tax is presumptively valid in the absence of Congressional legislation prohibiting it.

Arizona seeks to tax a transaction which does not involve a Tribe or Tribal members doing business on their home reservation. Such taxation imposes no burden on Tribal interests. Moreover, no provision of Federal law immunizes Blaze's activities from state taxation. In the absence of such legislation, Arizona can lawfully assess its transaction privilege tax against Blaze.

ARGUMENT

THE ARIZONA COURT OF APPEALS ERRED IN HOLDING THAT TAXATION OF THE GROSS RECEIPTS OF A FEDERAL CONTRACTOR IS PREEMPTED BY FEDERAL INDIAN LAW

The Arizona Court of Appeals held that the State could not impose its transaction privilege tax, a nondiscriminatory gross receipts tax, on Blaze Construction Co. for work it performed pursuant to con-

tracts it entered into with the Bureau of Indian Affairs to build roads on six Indian reservations in Arizona. The court held so notwithstanding that Blaze is not owned by a member of a Tribe whose reservation is located in Arizona (and that Blaze performed no work on its owners' home reservation) and that it contracted not with any Tribe but with a Federal agency.

As explained below, the status of the parties to this contract demonstrates that the legality of Arizona's transaction privilege tax is governed for federal law purposes by intergovernmental tax immunity. *See United States v. New Mexico*, 455 U.S. 720 (1982). The Arizona Court of Appeals, however, disregarded the clear rules of the intergovernmental tax immunity doctrine, which require that the tax be upheld, and instead applied Federal Indian law preemption analysis to invalidate the tax. The holding below misreads this Court's cases and marks an unwarranted expansion of Federal Indian law preemption analysis. If affirmed, the decision would threaten the States' authority to enforce a wide range of generally applicable state taxes and regulations on any contractor doing business with the Bureau of Indian Affairs. The judgment of the Arizona Court of Appeals should therefore be reversed.

A. Arizona's Assessment Of Transaction Privilege Tax On Blaze Does Not Violate Intergovernmental Tax Immunity Principles

1. More than sixty years ago, this Court made clear that a state tax on the gross receipts of a contractor that provides services to the Federal Government does not violate the intergovernmental tax immunity doctrine. *See Dravo Contracting*, 302 U.S. at

161. As the Court explained, "a nondiscriminatory tax upon the earnings of an independent contractor derived from services rendered to the government [can]not be said to be 'imposed upon an agency of government in any technical sense,' and [can]not 'be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way.'" *Id.* at 157 (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 524-25 (1926)).

In *United States v. New Mexico*, the Court subsequently explained that the immunity "may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." 455 U.S. at 734. Moreover, "immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government." *Id.* (citing *Dravo Contracting*, 302 U.S. at 154).

Judicial recognition of the immunity is thus "appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Id.* at 735. The Court's cases thus reject the notion that a contractor is entitled to the immunity because it is a "federal agent." *Id.* at 736. Rather, contracting entities are not immune from state taxation unless they are " 'integral parts of [a governmental department],' and 'arms of the Government deemed by it essential for the performance of governmental functions.'" *Id.* at 737 (quoting *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942)).

As the Court has explained, the reason for the narrow scope of intergovernmental tax immunity is

that Congress can provide a federal contractor with immunity by either "expressly providing as respects contracts in a particular form, or contracts under particular programs." *United States v. New Mexico*, 455 U.S. at 737; *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973). Whether a federal contractor is entitled to the immunity is thus a question of Congressional intent. *See United States v. New Mexico*, 455 U.S. at 737-38.

2. Application of these principles demonstrates that Blaze Construction is not entitled to immunity from Arizona's transaction privilege tax. Blaze is not an agency or instrumentality of the United States. Rather, it is a corporation organized under the laws of the Blackfleet Tribe of Oregon, *see* Pet. App. 2a, which was created and exists for the purpose of engaging in "'commercial activities carried on for profit.'" *United States v. New Mexico*, 455 U.S. at 734-35 (quoting *United States v. Boyd*, 378 U.S. 39, 44 (1964)); *see also* J.A. 12a. Congress has demonstrated no intent to "'incorporate[] [Blaze] into the government structure as to become [an] instrumentalit[y] of the United States and thus enjoy governmental immunity.'" *United States v. New Mexico*, 455 U.S. at 736 (quoting *Boyd*, 378 U.S. at 48). Blaze thus stands on the same footing as the Federal contractors whose assertions of entitlement to intergovernmental tax immunity were rejected in *United States v. New Mexico*, *see* 455 U.S. at 739-43, *Boyd*, *see* 378 U.S. at 48, and *Dravo Contracting*. *See* 302 U.S. at 149, 161.

Nor has Congress chosen to provide Blaze with immunity from Arizona's tax. Congress has not enacted a statute exempting contracts of the type Blaze entered into—a fixed fee contract—from state taxation. Moreover, Congress, in enacting the Federal Lands Highway Program, has not exempted federal contractors from state taxation. *See* 23 U.S.C. § 204 (Federal Lands Highway Program). Finally, neither the provisions of the Buy Indian Act (25 U.S.C. § 47) nor the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450e(b)), which Section 204 makes applicable to the Indian Reservation Roads program, demonstrate either expressly or implicitly a Congressional intent to immunize Blaze from state taxation. Congress is, of course, aware of this Court's decisions regarding the scope of intergovernmental tax immunity and its power to immunize federal contractors. Its failure to immunize Blaze from Arizona's transaction privilege tax ought to be the beginning and end of this case.

B. The Arizona Court Of Appeals Erred In Applying Indian Sovereignty Principles To Hold Arizona's Transaction Privilege Tax Preempted

1. The Arizona Court of Appeals gave no explanation as to why this Court's decision in *United States v. New Mexico* is not controlling. *See* Pet. App. 6a-7a. Instead, it proceeded to apply principles of Indian law preemption analysis to invalidate Arizona's tax. The court's application of the Indian preemption doctrine to a tax on a transaction that did not involve a Tribe or Tribal members has no support in this Court's cases and is a troublesome development for state tax and regulatory authority.

To the best of *amici*'s knowledge, this Court has never applied the balancing test of Indian law preemption analysis to an assertion of state authority over a transaction which did not involve a Tribe or its members. This is for good reason, as protecting

Tribal self-government is a principal purpose of the doctrine. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 161 (1980). Where, as here, a State assesses a tax on a transaction which does not involve a Tribe or its members, the tax does not interfere with tribal sovereignty.

The Court has thus explained that its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) (rejecting tribal court jurisdiction over auto accident on reservation involving non-tribal members). *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222-24 (1995) (upholding state income tax on members of Chickasaw Nation who worked for Tribe but reside off reservation).

The Court has further explained that "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" which prohibits state taxation "'absent cession of jurisdiction or other federal statutes permitting it.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (quoting *Mescalero Apache Tribe*, 411 U.S. at 148). The Court's "categorical approach," *County of Yakima*, 502 U.S. at 258, is

based on the recognition "that the federal tradition of Indian immunity from state taxation" of Tribes and their members "is very strong and . . . the state interest in taxation is correspondingly weak." *Cabazon Band*, 480 U.S. at 215 n.17. The categorical approach applies, the Court has explained, because "it is unnecessary to rebalance these interests in every case." *Id.*

This reasoning applies with equal force when a State asserts taxing authority over a transaction that does not involve a Tribe or its members. In such circumstances, the exercise of state authority does not interfere with Tribal self-government. *See County of Yakima*, 502 U.S. at 258. Indeed, a long line of cases establishes that in these instances the State's authority to tax is "very strong" and the Federal and Tribal interests are "correspondingly weak." *See Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264 (1897); *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *cf. Strate*, 117 S.Ct. 1404; *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). In such cases, there is no need for the judiciary to rebalance the various interests and usurp Congress' authority in the area.

In the earliest case, *Utah & Northern Railway*, a corporation challenged a territorial tax on its property located within the boundaries of an Indian reservation. The taxpayer contended that the tax interfered with the provisions of the treaty creating the reservation, asserting in essence a claim that the treaty preempted the territory's exercise of general jurisdiction. *See* 116 U.S. at 31. The Court rejected the argument, noting that "[t]he authority of the

Territory may rightfully extend to all matters not interfering with [the] protection" of the Indians and that "it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it." *Id.* at 31-32. *See also Maricopa & P. R.R. v. Territory of Arizona*, 156 U.S. 347 (1895).

In *Thomas v. Gay*, non-Indians challenged a territorial property tax on their cattle herds which grazed on lands leased from an Indian tribe. The herd owners argued that the tax was "a violation of the rights of the Indians," contending "that the Indians are directly and vitally interested in the property sought to be taxed" because the tax affected the value of the grazing lands. 169 U.S. at 273. The Court dismissed the argument, observing that "it is obvious that a tax upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." *Id.*

The herd owners further argued that the tax "conflict[ed] with the constitutional power of Congress to regulate commerce with the Indian tribes." *Id.* at 274. In this regard, the herd owners contended that Congress had enacted a statute which authorized the Tribes to lease "their unoccupied lands for grazing purposes" and that the tax "interfere[d] with . . . a lawful commercial intercourse with the Indians, over which Congress has absolute control." *Id.*

The Court also rejected this argument, explaining that:

> [t]he unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a State or Territory, of property of others than Indians would be an interference with Congressional power.
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> The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

Id. at 274-75.[4] *See also Montana Catholic Missions*, 200 U.S. at 128-29 (rejecting claim of immunity from state property tax by charitable organizations which used property for benefit of Indians); *Wagoner v. Evans*, 170 U.S. 588 (1898).

As these authorities make clear, where a State does not impose a tax on the commercial relationship between a Tribe and non-Indians, taxation of the activities and property of non-Indians (and non-Tribal members) imposes at most an insubstantial burden on Tribal interests. Because the burden on Tribal and Federal interests is so insubstantial where a Tribe or its members are not taxed, there is no need for judicial reweighing of the relevant interests. The tax is valid in the absence of Congressional legislation prohibiting it.

The Court has also used a categorical approach in cases involving the closely related issue of a State's

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[4] The Court has since made clear that non-Indian lessees of Indian lands are subject to non-discriminatory state taxation of gross production and to production excise taxes. *See Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949).

authority to impose taxes on Tribes and Indians off the reservation. In *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), the Court addressed the validity of state inheritance taxes imposed on the transfer of the estates of deceased members of the Five Civilized Tribes. The Tribes had "no effective tribal autonomy" and their members held their lands in fee. *Id.* at 603. Notwithstanding that the Indians were wards of the United States, the Court refused to exempt them from non-discriminatory state taxes in the absence of express Congressional action granting them an exemption from estate taxes. *See id.* at 603-10. As the Court observed, "This Court has repeatedly said that tax exemptions are not granted by implication" and that this rule applies "to taxing acts affecting Indians as to all others." *Id.* at 606. The Court further explained that "[i]f Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words." *Id.* at 607.

To similar effect is *Mescalero Apache Tribe*. In *Mescalero*, the Court upheld New Mexico's authority to impose a gross receipts tax on a ski resort which the Tribe operated off the reservation. The Court reasoned that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. In so holding, the Court rejected the Tribe's claim that the Indian Reorganization Act, which encouraged Tribes "to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe," *id.* at 151,

conferred intergovernmental tax immunity on the Tribe's enterprise. *See id.* at 151-55.

Moreover, the Court rejected the Tribe's argument that Section Five of the Indian Reorganization Act, 25 U.S.C. § 465, which provides immunity from state taxes for "any lands or rights acquired" by the Federal Government on behalf of a Tribe or its members, exempted the Tribe's enterprise from the gross receipts tax. As the Court explained, "absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." 411 U.S. at 156. *See also Chickasaw Nation*, 115 S.Ct. at 2222-24 (upholding Oklahoma's income tax on members of Chickasaw Nation who were employed by Tribe but resided off the reservation).

To reject the clear categorical approach of these cases in favor of the multi-factor balancing test applied by the Arizona Court of Appeals would call into question a wide range of state taxes on non-Indians. For example, non-Tribal employees of federal contractors hired to provide services on Indian reservations might well claim that a state income tax violates Indian sovereignty principles on the ground that the tax reduces the total amount of services the contractor could otherwise provide a Tribe. And similar to this case, federal contractors could contend that state sales and use taxes violate Indian sovereignty principles by reducing the total amount of goods and services which the Federal Government obtains on behalf of a Tribe. The uncertainty and potential for disruption to state taxation inherent in the lower court's methodology demonstrates the wisdom of continued adherence to the categorical ap-

proach of *Thomas* and *Utah & Northern Railway*. And where, as here, a tax falls on a federal contractor, there is no reason for discarding the clear principles of this Court's intergovernmental tax immunity cases in favor of the multi-factor balancing approach of Indian preemption analysis.

2. As authority for applying the balancing approach of Indian preemption law, the Arizona Court of Appeals relied on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In particular, the lower court relied on this Court's statement that where " 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation,' " the

> "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Pet. App. 6a (quoting 448 U.S. at 144-45). According to the court of appeals, "[t]his formulation neither suggests nor implies that Indian law preemption analysis is inapplicable when the on-reservation activities of non-Indians over which the state seeks to exercise authority do not arise out of direct commercial relations with the tribe or a tribal entity." *Id.* at 7a. The lower court further reasoned that "nothing in the Court's application of that analysis in *White Mountain* suggests that it implicitly follows any such limitation. The identity of the nominal contracting party in fact played no part in the inquiry." *Id.*

The court's reasoning begs the question of why *White Mountain* would contain such a limitation when the tax was levied on a contractor which did business with a Tribal entity and its ultimate incidence fell on the Tribe. *See* 448 U.S. at 139, 151.[5] This Court decides cases and controversies based on the legal relations of the parties before it and not "upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). It is thus no surprise that *White Mountain* does not address whether Indian law preemption principles apply to a tax on the gross receipts of a federal contractor.

Indeed, while *White Mountain* articulated as a rule of decision the above-described balancing test, at bottom the case was no more than an implied preemption case. As the Court made clear, "[o]ur decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room for the additional burdens sought to be imposed by state law." 448 U.S. at 151 n.15 (citing *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)). In short, the Court would have come to the same result in *White Mountain* simply by applying traditional preemption principles.

This Court's other cases demonstrate that the *White Mountain* balancing approach exists for the middle ground of cases which fall between the *per se* prohibition of taxation of Indian Tribes and their members when on their reservations, *see Cabazon Band*, 480 U.S. at 215 n.17, and the categorical rule allowing

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[5] The Court signalled its awareness of this feature of the case when it indicated that the case presented "the question whether a particular state law may be applied to an Indian reservation or to tribal members." 448 U.S. at 142.

States to apply non-discriminatory taxes to "Indians going beyond reservation boundaries." *Mescalero Apache Tribe*, 411 U.S. at 148. The balancing approach is appropriate where it is not clear at the outset whether state or Tribal interests should prevail. But where, as here, a transaction does not involve an Indian tribe or Tribal members doing business on their home reservation, it is clear that state interests predominate in the absence of Congressional legislation to the contrary. *See id.*; *see also Chickasaw Nation*, 115 S. Ct. at 2222-24.[6]

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[6] The Court's cases have frequently recognized that state interests prevail over Tribal interests even where a State seeks to tax a transaction involving a Tribal enterprise. For example, in *Cotton Petroleum* the Court upheld the imposition of an eight percent oil and gas severance tax on lessees of Indian lands. It noted that while it is

> reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,] [a]ny impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects . . . is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.

490 U.S. at 186-87.

To similar effect are *Colville* and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the Court upheld the application of state sales taxes to on-the-reservation transactions between Indian retailers and non-Indian customers. *See* 425 U.S. at 482. In *Colville*, the Court held that a State can impose tax on sales to Indians resident on the reservation who were not enrolled in the Tribe. *See* 447 U.S. at 160-61. As the Court noted in *Colville*:

> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

Id. at 161.

If state taxation of BIA's contractors unduly interferes with the administration of the agency's programs, it can seek legislation from Congress preempting such taxes. *Cf.* 25 U.S.C. § 465 (exempting lands acquired by the Secretary of the Interior for Tribes from state and local taxation).[7] For more than sixty years, however, the Federal Government has managed to function notwithstanding that its contractors must pay state gross receipts taxes. *See Dravo Contracting*, 302 U.S. at 161. That Congress has not pro-

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[7] While Tribal interests are not relevant in assessing the validity of Arizona's assessment of Blaze, the Arizona Court of Appeals apparently accepted Blaze's contention that because Tribal contractors are immune from state tax, taxation of BIA contractors conflicts with BIA's regulations because it "attaches an undesirable consequence to a tribe's decision not to seek to administer construction programs in the BIA's place by effectively reducing the road-improvement services that the tribes can receive in return for the available federal funding." Pet. App. 13a (citing 25 C.F.R. § 271.4(d) & (e)).

The same, however, could be said for numerous other non-discriminatory state laws which, under Indian sovereignty principles, might be unenforceable when a Tribe itself contracts. That requiring federal contractors to comply with other state laws might make Tribal contracting more advantageous does not justify holding them preempted. Tribes, after all, retain the choice as to whether to contract directly or through the offices of the authorized federal agency.

hibited States from taxing the gross receipts of BIA contractors establishes that Arizona can lawfully assess its transaction privilege tax on Blaze.

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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